IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 845

OUACHITA PARISH SCHOOL BOARD,

Petitioner,

vs.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana.

ORIGINAL BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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SUBJECT INDEX.

	Page
QUESTION PRESENTED FOR REVIEW	1
ARGUMENT FOR DENIAL OF WRIT	3
FINALITY OF JUDGMENT	7
CONCLUSION	8
CERTIFICATE OF SERVICE	10

TABLE OF CASES.

Bruce, et al., v. Tobin, 38 S. Ct. 7, 245 U. S. 18, 62 L. Ed. 123	7
Durley v. Mayo, 76 S. Ct. 806, 351 U. S. 277, 100 L. Ed. 1178	2
Geo. O. Richardson Machinery Co. v. Scott, 48 S. Ct. 264, 276 U. S. 128, 72 L. Ed. 497	2, 4
Honeyman v. Hanan, 57 S. Ct. 350, 300 U. S. 14, 81 L. Ed. 476	5
Musser, et al., v. State of Utah, 68 S. Ct. 397, 333 U. S. 95, 92 L. Ed. 562	2, 6
Pascal v. Burke, 90 F. Supp. 868	7
Southwestern Bell Telephone Co. v. State of Oklahoma, et al., 58 S. Ct. 528, 303 U. S. 206, 82 L. Ed. 751	2, 5
Speiser v. Randall, 78 S. Ct. 1332, 357 U. S. 513, 2 L. Ed. (2d) 1460	2

TABLE OF CASES (Continued)

	Page
United States, ex rel. Herge, v. Commonwealth of Pennsylvania, 89 F. Supp. 636	6
Urie v. Thompson, 69 S. Ct. 1018, 337 U. S. 163, 93 L. Ed. 1282	
Williams v. Kaiser, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398	25
Young v. Ragen, 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333	2

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May It Please the Court:

I.

QUESTION PRESENTED FOR REVIEW.

The Supremacy Clause of the Constitution of the United States is not properly the basis of the question

tendered for review by the application of petitioner for writ of certiorari. The decision of the Supreme Court of Louisiana rendered December 29, 1961, was predicated solely and entirely on the pertinent and applicable portions of the Constitution and statutes of the State of Louisiana and the decision was rendered on and supported by wholly nonfederal grounds, no federal question or issue in the instant case having been presented to the Supreme Court of Louisiana and no such federal question was necessary to the determination of the case, as is shown affirmatively by the opinion of the Supreme Court of Louisiana in the case of *Terrebonne Parish School Board v. St. Mary Parish School Board, et al.* (1962), 138 So. (2d) 104 (R-168), which appears in the petition as appendix 2, referred to in the decision of the instant case (R-19), which also appears in the petition as appendix 1, all in accordance with the well-recognized and established jurisprudence of the inferior federal courts and this Court. *Southwestern Bell Telephone Co. v. State of Oklahoma* (1928), 58 S. Ct. 528, 303 U.S. 206, 82 L. Ed. 751; *Williams v. Kaiser* (1945), 65 S. Ct. 363, 323 U.S. 471, 89 L. Ed. 398; *Geo. O. Richardson Machinery Co. v. Scott* (1928), 48 S. Ct. 264, 276 U.S. 128, 72 L. Ed. 497; *Musser v. State of Utah* (1948), 68 S. Ct. 397, 333 U.S. 95, 92 L. Ed. 562; *Dudley v. Mayo* (1956), 76 S. Ct. 806, 351 U.S. 277, 100 L. Ed. 1178; *Young v. Rayen* (1949), 69 S. Ct. 1073, 337 U.S. 235, 93 L. Ed. 1333; and *Spector v. Randall* (1958), 78 S. Ct. 1332, 357 U.S. 513, 2 L. Ed. (2d) 1460, as well as many other positive and unequivocal an-

thorities in support of this principle. This issue is the sole question presented, as shown by the petition for writ at page 5, No. III.

The Supreme Court of Louisiana **did not hold**, that it (the Supreme Court of Louisiana) was not bound to accept the adjudication of unconstitutionality of a statute because the Federal Court decision was **motivated** by considerations of racial segregation, as the petition for writ asserts (pp. 5, 7). No such holding was made and such a holding cannot reasonably be inferred from the language of the decision of the Supreme Court of Louisiana. The Court merely discussed the *Bush* case and others **after a decision had been reached** on the basis of the Constitution and statutes of Louisiana and wholly without the consideration of any federal question, pretermitting that no federal issue had been presented in the submission of this case to the Supreme Court of Louisiana.

II.

ARGUMENT FOR DENIAL OF WRIT.

At the outset, it is appropriate to assert that the decision sought to be reviewed does not represent any form of interposition, judicial or otherwise, and in no way involves the question of segregation.

The decision of the Supreme Court of Louisiana is grounded wholly and completely on the application and in-

terpretation of the Constitution and statutes of Louisiana. No issue of a federal question of substance or of repugnancy of the Louisiana statute under consideration to the Constitution of the United States was before the Louisiana Court. The grounds of decision were wholly adequate under State law and required no reference to federal law or jurisprudence. Any reference thereto was incidental and the physical format of the decision sought to be reviewed supports the thesis that the judgment had been reached on an adequate and nonfederal basis prior to any discussion by the Supreme Court of federal decisions, particularly the *Bush* case, but this discussion in nowise formed the groundwork for the decision; in fact, this discussion might well be placed in the category of *obiter dicta*.

The legal position of respondent, as set forth herein, is predicated on a solid bulwark of federal decisions and jurisprudence, typical of which are many decisions of this Court.

The case of *Gee, O. Richardson Mach'y Co. v. Scott*, 1928, 48 S. Ct. 264, 276 U.S. 128, 72 L. Ed. 497, is authority for the proposition that where a decision of a state court rests on adequate nonfederal ground, writ of certiorari issued by United States Supreme Court may be dismissed, notwithstanding unnecessary discussion by state court of constitutional question. This Court said:

> "A the decision of that court was rested, and may rest, on this rule, an adequate nonfederal ground

the writ must be dismissed. Billy v. Stewart, 246 U.S. 253, 257, 38 S. Ct. 261, 62 L. Ed. 701; Doyle v. Atwell, 261 U.S. 590, 591, 43 S. Ct. 440, 67 L. Ed. 811."

To the same effect is the case of *Hoeffgen v. Hassler* (1937), 57 S. Ct. 350, 300 U.S. 14, 81 L. Ed. 476:

"Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause."

Another solid and typical case is that of *Southwestern Bell Telephone Co. v. State of Oklahoma, et al.* (1938), 58 S. Ct. 528, 303 U.S. 206, 82 L. Ed. 751, in which the decisive language is:

"We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

The same rule is applicable in criminal cases, as attested by the language of this Court in the case of

Williams v. Kaiser (1945), 65 S. Ct. 363, 323 U.S. 471, 89 L. Ed. 398:

> "... It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause."

Another case is that of *Musser, et al., v. State of Utah* (1948), 68 S. Ct. 397, 333 U.S. 95, 92 L. Ed. 562, which contains the following:

> "... What the statutes of a State mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe." ...

The legal principle exemplified by the foregoing cases has been enunciated and followed by the inferior federal courts. To this effect is the case of *United States, ex rel. Hoeye, v. Commonwealth of Pennsylvania* (1950), 89 F. Supp. 636:

> "It is a well-established principle that before the Supreme Court will review a decision of a state court, it must affirmatively appear from the record

> that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause." * * *

A similar case is that of *United States, ex'rel. Pascal, v. Banks* (1950), 90 F. Supp. 868.

III.

FINALITY OF JUDGMENT.

It is essential that the finality of the judgment of the state Court be present for the purposes of remedy by certiorari. It is submitted that such finality is not presented in the application for writ, since the judgment rendered is of an interlocutory nature, being a decision on the intermediate or interlocutory pleadings of exception of no right of action, motion to dismiss and motion for summary judgment. This judgment (Appendix I, page 17, of the petition) concludes with this verbiage:

> "For the reasons assigned the judgment of the district court overruling the exception of no right of action, the motion to dismiss the proceedings, and the motion for summary judgment vacating and annulling the order of expropriation is affirmed, and **the case is remanded to the district court for further proceedings.**" (Emphasis added.)

This view as to finality of judgment is supported by the jurisprudence. The case of *Brown, et al., v. Tobin* (1917), 38 S. Ct. 7, 245 U. S. 18, 62 L. Ed. 123, clarifies this concept as follows:

> "The act in question, although it deprived of the right of review by writ of error which had

hitherto obtained in certain cases and substituted as to such cases the right of petitioning for review by certiorari subjected this last right to the same limitation as to the finality of the judgment of the state court sought to be reviewed which had prevailed from the beginning under section 709, Rev. Stat. (section 237, Judicial Code [Comp. St. 1916, § 1214]. **Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the act of 1916.**" (Emphasis added.)

Further support is furnished in the determination of the case of *Urie v. Thompson* (1949), 69 S. Ct. 1018, 337 U. S. 163, 93 L. Ed. 1282, in which the categorical essentiality of finality is pronounced:

"From the opinions of the state supreme court we know judicially that its judgment negating the general claim for negligence was coupled with its subsequently repudiated conclusion that petitioner had stated a cause of action under the Boiler Inspection Act and that, consequently, the court remanded the cause for trial, not for dismissal. **The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute.** 28 U. S. C. § 344(b) [now § 1257(3)], 28 U. S. C. A. § 1257(3)." (Emphasis added.)

CONCLUSION.

For the reasons set forth hereinabove, it is submitted that the petition for writ of certiorari to review

the judgment of the Supreme Court of Louisiana, dated December 29, 1961, should be denied.

Respectfully submitted,

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By: GLENN S. DARSEY,

By: NORMAN L. SISSON,

May 17, 1962.

CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing brief has been served on the petitioner, Ouachita Parish School Board, in accordance with Rule 33 of the Revised Rules of the United States Supreme Court, through counsel of record, George M. Snellings, Jr., Esq., by depositing same in a United States Post Office, first-class postage prepaid, addressed to counsel of record at 603 Bernhardt Building, Post-Office Box 1663, in Monroe, Louisiana, and that I am a member of the Bar of the United States Supreme Court.

Baton Rouge, Louisiana, May 28, 1962.

Norman L. Sisson

NORMAN L. SISSON